PP v. AMBIKA MA SHANMUGAM

HIGH COURT MALAYA, GEORGETOWN
AKHTAR TAHIR J
[CRIMINAL TRIAL NO: PA-45B-9-10-2018]
26 APRIL 2019

CRIMINAL PROCEDURE: *Trial – Discontinuance – Murder – Prosecution discontinued trial midway and applied for order of discharge not amounting to acquittal (DNAA) – No reason afforded for seeking DNAA – Whether accused ought to be given DNAA – Whether ought to be acquitted and discharged – Criminal Procedure Code, s. 254*

The prosecution, having charged the 60-year-old accused with murder under s. 302 of the Penal Code and having thereafter called three witnesses to testify on its behalf had, for some undisclosed reasons, decided to discontinue with the trial. In the event, the learned Deputy Public Prosecutor applied to the learned judge for the accused to be given a discharge not amounting to an acquittal ('DNAA') pursuant to s. 254 of the Criminal Procedure Code ('CPC'). The accused argued and retorted that considering his old age and bad health, he ought instead to be given a discharge amounting to an acquittal ('DAA') under the same section of the CPC.

Held (refusing application; acquitting and discharging accused):

(1) From the reading of s. 254 of the CPC, it is clear that the court has discretion in certain circumstances to order a DAA instead of a DNAA. (para 5)

(2) The fact that the trial had already begun coupled with the DPP's inability to inform the court the reasons for applying for a DNAA provided cogent reasons for the court to order a discharge amounting to an acquittal (DAA). The accused is already 60 years old and has health issues, and it would be unjust for him to again face the prospect of being recharged and remanded. Further, the court had given priority to this trial, and it would be unfair for the court to again reschedule this case in the event the accused is recharged. (para 6)

Case(s) referred to:
Koh Teck Chai v. PP [1967] 1 LNS 72 HC ***(refd)***
PP v. Lau Ngiik Yin [2008] 10 CLJ 410 HC ***(refd)***
PP v. Syed Abdul Bahari Shahabuddin [1975] 1 LNS 137 HC ***(refd)***
Tan Ah Chan v. Regina [1955] 1 LNS 155 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 254(3)

For the applicant - Kamaliza Md Zain & Nabila Huda; State Legal Advisor, Pulau Pinang
For the respondent - Anbanathan Yathirajun & Tishalini Naganathan; M/s Anba & Assocs

Reported by Wan Sharif Ahmad

JUDGMENT

Akhtar Tahir J:

The Charge

> Bahawa kamu pada 10 Februari 2018, jam lebih kurang 04.00 petang, di rumah No. 67, Medan Kota Permai 2, Taman Kota Permai 2, Bukit Mertajam, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang telah melakukan bunuh dengan menyebabkan kematian kepada Adelina Lisao, warganegara Indonesia No. Paspot A4725964. Oleh itu, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

The Proceedings

[1] In this case, trial had proceeded with the calling of three prosecution witnesses and further dates had been given for the continuation of the trial.

[2] The prosecution on the date for continuation of the trial informed that it did not want to proceed with the trial and instead applied for discharge not amounting to acquittal (DNAA) of the case. Even after repeated questioning by the court as to the reason for such an application, all the learned Deputy Public Prosecutor (DPP) could say was that she was instructed to apply for DNAA.

[3] The learned defense counsel citing s. 254(3) of the Criminal Procedure Code urged the court to grant discharge amounting to acquittal (DAA) citing the old age and bad health of the accused.

[4] The relevant provision to be looked at when the prosecution does not intend to proceed with the prosecution is s. 254 of the Criminal Procedure Code. Section 254 states as follows:

> (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
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> (2) At any stage of any trial before a Sessions Court or a Magistrates Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and

thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.

(3) Such discharge shall not amount to an acquittal unless the Court so directs.

[5] From the reading of the above provision, it is clear that the court has in certain circumstances a discretion to order DAA instead of DNAA.

[6] In this case, as the trial had begun and the inability of the learned DPP to inform the court the reasons for applying for DNAA are cogent reasons for the court to order DAA. Further, the accused is over 60 years old and has health issues. Under these circumstances, to have a possibility of being recharged again and be remanded will be unjust to the accused. The court had given priority to this case and begun the trial. It would be unfair to the court to again reschedule this case in the event the accused is recharged.

[7] The court in ordering DAA is guided by a number of authorities cited below.

In the case of *PP v. Lau Ngiik Yin* [2008] 10 CLJ 410; [2007] 3 MLRH 238 it was stated as follows:

> In my view the court must order an acquittal and not DNAA, when the prosecutor has shown disinterestedness in prosecuting the case or the prosecution is not able to prosecute the case for good reasons and is unlikely the case can be prosecuted expeditiously in the short future. This is so because the liberty of His Majesty's subject cannot be placed by a continuous threat of prosecution by only an order of discharge. Such an order may be against constitutional guarantees.

In the case of *Koh Teck Chai v. PP* [1967] 1 LNS 72; [1968] 1 MLJ 166 it was decided as follows:

> as Mr. Justice Murray-Aynsley as he then was in that case said:
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> Section 254(ii) provides such discharge shall not amount to an acquittal unless the court so directs, except in cases coming undersection 171. Such discharge means, however, discharge under section 254. Therefore for a discharge to amount to an acquittal without a special order of the magistrate it must fall within the provisions of section 254 as well as of section 171. Section 187(1) of the S.S.Code is identical with section 254(ii) and the application was made under that section so that it is clear that the learned magistrate had power to order an acquittal.
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> If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely.

A Where the prosecution are unable to proceed for the time being owing to the difficulty of obtaining a witness or for some other cause and are unable to satisfy the court that they will proceed with the prosecution within a reasonable time, then there would be good grounds for a discharge not amounting to an acquittal. In this case, however, although counsel apparently only asked for a discharge not amounting to an
B acquittal I think the proper order would have been a discharge amounting to an acquittal.

Accordingly, as the learned magistrate had misdirected himself as to his power to make the order, I would for myself decide whether in all the circumstances of the case such order under section 187(1) should amount
C to an acquittal.

In the case of *PP v. Syed Abdul Bahari Shahabuddin* [1975] 1 LNS 137; [1976] 1 MLJ 87 Abdool Cader J (as he then was) stated as follows:

I would only pause to observe that when there is no reasonable prospect of a case proceeding as a result of the absence of one or more witnesses
D or for some other cogent reason, then the prosecution should act under the provisions of section 254 of the Criminal Procedure Code. Sub-section (iii) of section 254 specifically enacts that a discharge under that section shall not amount to an acquittal unless the court so directs.

It is settled law that unless there are good grounds to the contrary, a
E discharge under this provision should amount to an acquittal. Good grounds for a discharge not amounting to an acquittal would arise where the prosecution is unable to proceed for the time being but can satisfy the court that the temporary impediment is not unsurmountable and that it will proceed within a reasonable time. This seems to be the *raison d'etre* for the scheme providing for a discharge not amounting to an acquittal.

F In the case of *Tan Ah Chan v. Regina* [1955] 1 LNS 155; [1955] 1 MLJ 218 Spenser Wilkinson J observed as follows:

The appellant was charged in the Sessions Court with three charges of criminal intimidation under section 506 of the Penal Code. Subsequently
G the charges were withdrawn by the Deputy Public Prosecutor under the provisions of section 187 of the Criminal Procedure Code, and the learned President discharged the appellant of and from the charges but did not order that such Discharge should amount to an acquittal.

It would appear that although the appellant was represented by Counsel the attention of the learned President was not drawn to the numerous
H decisions of 1955 1 MLJ 218 at 219 the Courts in this country to the effect that unless good cause is otherwise shown a discharge under this section should amount to an acquittal.

[8] However, it is to be noted that the accused has only been discharged and acquitted for the offence of murder. The prosecution has still the
I opportunity to charge the accused with other offences if they so wish.